

Exhibit B

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x
4 RYAN MELVILLE, on behalf of himself
and all others similarly situated,

5 Plaintiff,

6 -vs-

21 CV 10406 (KMK)
Teleconference

7 HOP ENERGY, LLC,

8 Defendant.

9 -----x

10 United States Courthouse
White Plains, New York
July 18, 2023

11 ** VIA TELECONFERENCE **

12 Before, THE HONORABLE VICTORIA REZNIK, Magistrate Judge

13 APPEARANCES:

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25 *Proceedings recorded via digital recording device*

1 THE COURT: Good morning. Can everyone hear me? This
2 is Judge Reznik.

3 MS. McTERNAN: Yes.

4 MR. McINTURFF: Yes, Your Honor.

5 THE COURT: Wonderful. So this is Melville v. Hop
6 Energy.

7 Will the parties introduce themselves to me, starting
8 with the plaintiff?

9 MR. McINTURFF: Good morning, Your Honor. This is
10 Burkett McInturff on behalf of plaintiff and the proposed class.

11 MR. SHUB: Good morning, Your Honor. Jonathan Shub on
12 behalf of plaintiff and the putative class.

13 MS. McTERNAN: Good morning, Your Honor. Pauline
14 McTernan of Otterbourg, P.C. on behalf of defendant, and I'm
15 joined by my colleagues: William Moran, Andrew Halpern, and
16 Alexandra Cosio-Marron.

17 THE COURT: Thank you. Could you repeat your last
18 name for me, please?

19 MS. McTERNAN: Sure. McTernan.

20 THE COURT: McTernan. Thank you. And will you be
21 speaking on behalf of the defendant this morning?

22 MS. McTERNAN: I will.

23 THE COURT: Okay. Wonderful.

24 So we called this status conference I think initially
25 just to update me on the status of the case, but I understand

1 that in the interim there has been a dispute about discovery.
2 So before we dive in, has there been any positive progress on
3 that front, Mr. McInturff?

4 MR. McINTURFF: Your Honor, when you said "positive
5 progress," do you mean positive progress on discovery or
6 positive progress on the parties' dispute?

7 THE COURT: On the dispute. Well, why don't we start
8 with this: Is there, beyond the dispute that the letter -- the
9 letters indicated exists, what is the status of discovery?

10 MR. McINTURFF: So the parties have -- are in ongoing
11 meet-and-confers regarding defendant's responses to plaintiff's
12 document requests and interrogatories. We are expecting a
13 production from defendant -- it would be the defendant's first
14 production -- by the end of the day today. Plaintiff is going
15 to make their document production. We are aiming to make that
16 production tomorrow. The defendant responded to our proposed
17 ESI protocol last week, and we are working on a response to
18 that.

19 So generally, the parties are working together in
20 discovery, and we have been active in discovery, but we do have
21 this dispute, and there are probably two or three other issues
22 that we might reach final impasse on, but the parties are still
23 discussing; but should we not be able to work those issues out,
24 we would be contacting the Court in the next couple of weeks, I
25 suspect.

1 THE COURT: Okay. And what is the -- can you remind
2 me what the fact discovery deadline is?

3 MR. McINTURFF: I don't have it in front of me. I
4 will look now.

5 MS. McTERNAN: January --

6 MR. McINTURFF: I think it's -- sorry. Go ahead,
7 Pauline. Do you have it?

8 MS. McTERNAN: I'm sorry. Yeah, I was just looking at
9 the scheduling order. The deadline for fact discovery is
10 January 18th.

11 THE COURT: Okay. And at this point do the parties
12 anticipate that you will be able to meet that deadline?

13 Mr. McInturff?

14 MR. McINTURFF: I'm hopeful. We haven't seen any
15 documents yet from the defendant, and we haven't started search
16 term negotiation or ESI negotiations, but I'm hopeful. We are
17 certainly going to do our level best.

18 THE COURT: Okay. So, Ms. McTernan, is there anything
19 you wanted to add more generally about the status of discovery?
20 We will separately get to the dispute.

21 MS. McTERNAN: No. I think that that provided a good
22 summary of it. You know, we provided things last week that
23 relate to ESI that we'll continue to meet and confer about in
24 the near future, and yeah, we are still anticipating the
25 documents to go out today, and so I think -- I think that was a

1 fair summary.

2 THE COURT: Okay. So then why don't we turn to the
3 letters that were written?

4 Mr. McInturff, do you want to start by addressing
5 them, please?

6 MR. MCINTURFF: Sure, Your Honor.

7 So as set forth in plaintiff's letter, the dispute is
8 about the defendant's vagueness objection to the class
9 definition in the complaint, which includes customers who were
10 served under a contract that promised a promotional prevailing
11 retail price for first-year customers, as well as any other
12 customers who were served under a contract that combined the
13 concept of prevailing retail price with either the concept
14 "promotional" or the concept so that and as set forth in our
15 letter, the defendant lodged a vagueness objection to use of our
16 term "concept" in preliminarily defining the class.

17 And at bottom, the real concern here is we do not
18 agree with defendant's proposed revision to the class definition
19 to take out the word "concept" and substitute it with the word
20 "words" because we are concerned that that may limit the scope
21 of contracts that are subject to the preliminary class
22 definition, and we've tried to meet and confer to explain that
23 when we use the word "concepts," we are talking about -- you
24 know, a synonym of concepts would be the notion of or the idea
25 of these particular phrases that are in the defendant's form

1 contract; and the defendant is taking the position, which they
2 took in their letter at ECF 50, that they cannot tell what types
3 of additional contracts plaintiffs may be referring to, and we
4 don't believe that that is a credible objection. We think that
5 the terms are clear, and that this vagueness objection could
6 potentially limit the scope of the proposed class before we've
7 had adequate fact discovery. And as set forth in our letter, we
8 are entitled under the rules to take discovery to -- in order to
9 support our class certification motion.

10 So we've met and conferred on this issue. Defendants
11 continue to take the position that they don't understand the
12 class definition and that they cannot produce discovery or they
13 cannot tell what contracts would fall under the class
14 definition, and so that would unilaterally redefine the class,
15 and we are moving to strike that redefinition for a number of
16 reasons as set forth in our letter. I won't go into them, but
17 fundamentally, we think that defense counsel does understand
18 what the class definition is and can search for discovery for
19 proposed class members, and so we are asking that the Court
20 direct them to do so.

21 THE COURT: Okay. Ms. McTernan?

22 MS. McTERNAN: Sure. So I guess two main points:
23 First is that, you know, we have been raising this question of
24 what is intended by the words "concepts" ever since, you know,
25 since we filed our answer to the amended complaint, and it's

1 | just been a consistent question to us since that's the way the
2 | class has been defined. And, you know, we are just coming about
3 | this practically. You know, we are not trying to be nitpicky
4 | here. We are the ones that are going to be charged with
5 | performing a reasonably diligent search, and, you know, when we
6 | sit back and look at the request, you know, it's easy to kind of
7 | look for contracts that have, you know, pricing terms that set
8 | the customer's price in a way that combines the words
9 | "promotional" or "first-year customers with prevailing retail
10 | price" and also with the exact language that's in plaintiff's
11 | complaint. But once, you know, plaintiff -- and, frankly, when
12 | we lodged the vagueness objection, we didn't think that this
13 | would be -- you know, become such an issue because we had
14 | assumed that that's what we -- you know, we were doing search
15 | terms as an example. We had assumed that we would be searching
16 | for these terms, but -- but now that it's turned into a broader
17 | issue, we are just not -- you know, we just have not received
18 | clarity on what -- what more than the actual words themselves
19 | would be captured by, you know, phraseology of concepts. You
20 | know, it's just unclear that we are just trying to perform our
21 | duties, you know, and avoid misunderstandings, you know. We
22 | don't -- introducing the word "concepts" here kind of introduces
23 | a subjectiveness that just may -- we are worried will cause
24 | further misunderstanding.

25 | So that is the reason for the vagueness objection. We

1 are not trying to be nitpicky, but we are just being charged
2 with actually finding these things, and we just to date have not
3 had clarity on what more these -- the word "concepts" is
4 supposed to catch in respect to this needs requests.

5 THE COURT: So first question: You mentioned that the
6 parties are working out an ESI protocol. How are the searches
7 for these documents being conducted? Through search terms? Is
8 this ESI that we are looking through or are we looking through
9 hard copies? Can you give me an explanation of that, Ms.
10 McTernan?

11 MS. McTERNAN: Sure. So the ESI protocol -- so little
12 bit subject to negotiation -- but there will be -- I think the
13 parties are agreed that there will be a search term process
14 where, you know, defendant proposes a set of search terms that
15 will then be commented upon by the plaintiffs for the ESI, and
16 we expect that the bulk of the -- the bulk of the discovery will
17 be ESI. You know, we have an ESI vendor. This case will
18 involve a lot of data like database information and the like and
19 things stored in the data. So we do anticipate the bulk of it
20 being the ESI, which would be captured by the search terms.

21 THE COURT: And that would be true even for these
22 contracts that are referred to in the letters where you are
23 searching for the terms or the concepts of promotional
24 prevailing retail price; is that true?

25 MS. McTERNAN: Yes, for the most part except I would

1 | like to caveat that, which is, we have pulled -- our client has
2 | pulled things that are kind of stored in an easy access format.
3 | You know, things within the last year are obviously easier to
4 | obtain than things that have since made it onto the servers. So
5 | to the extent that contracts, you know, used -- again, the time
6 | period goes back to 2015 here, right? So to the extent that
7 | contracts have been migrated to servers, which will be searched
8 | for the ESI, that -- those will be, you know, encompassed by
9 | that search. But we have separately pulled, you know, and
10 | looked through contracts that are kind of applicable in the past
11 | year. So that would be sort of like the carve-out.

12 | THE COURT: And what's the volume of those documents
13 | that are just being done more manually in sort of the old-
14 | fashioned way versus the search terms?

15 | MS. McTERNAN: The volume would differ significantly.
16 | I mean, the bulk would be the ESI. You know, these -- their
17 | requests call for exemplar contracts. So, you know, there are
18 | like --

19 | (Brief interruption)

20 | MS. McTERNAN: Sorry. Can you hear me?

21 | THE COURT: Yes, I can. Go ahead.

22 | MS. McTERNAN: So the bulk of it will be the ESI, the
23 | vast bulk of it.

24 | THE COURT: Okay. So, Mr. McInturff, in light of the
25 | fact that the parties are going to be working out an ESI

1 protocol, and search terms are going to be used, why wouldn't
2 this dispute sort of just be resolved through the list of search
3 terms that you agree will be used to search for the contracts
4 and other document requests that include the concepts of the
5 promotional prevailing retail price for first-year customers?

6 MR. McINTURFF: Let's take this in two parts.

7 First, it's news to us that the -- this, the
8 defendant, which is one of the largest home heating oil
9 companies in the Northeast that serves tens of thousands, if not
10 hundreds of thousands of customers, does not have a way to
11 quickly gather the form contracts that it drafts and asks
12 customers to sign and produce those.

13 We've been operating under the understanding that the
14 company had a central repository of form contracts. They may be
15 in certain folders on a server, but they are not -- they do not
16 require search terms. I've never had a case with a consumer-
17 facing company that had to use search terms to identify the
18 contracts that it utilized over the class period, and I'm quite
19 surprised at the notion that we would have to use search terms
20 to gather contracts.

21 So I expect that the defendant will be able to gather
22 the contracts that were applicable during the relevant period --

23 (Brief interruption)

24 MR. McINTURFF: -- and that they will be able to
25 produce the contracts during the applicable period, and that

1 does not require the use of search terms.

2 And then, as my colleague or Ms. McTernan mentioned,
3 there is significant data, charging data and database data
4 that's going to be produced with respect to potential class
5 members. So the first step is to look at these contracts and
6 identify which contracts -- which customers were served under
7 which contracts and then to produce the data associated with
8 those customers. Again, that is not a search term related
9 search and is not going to require search terms.

10 Now, when it comes to discovery about conversations
11 about potential class members, I agree that we will have to use
12 words instead of, you know, just the concepts; but when we
13 propose search terms reflective of our class definition, we are
14 going to propose synonyms to terms like "first-year customers,"
15 and "promotional." Like we would propose terms like "first
16 anniversary" or "new customers," and as a synonym of
17 promotional we would propose terms like "introductory" and
18 "discounted" or "incentive."

19 But the point here is not about how the parties are
20 going to go about searching for documents. The point is, is
21 that we have defined a class in a cogent manner, and the
22 defendant has an obligation. For example, we asked, turn over
23 the contracts that fall within the class definition. The
24 defendant has not come back to us and said, Oh, here is this
25 subset of contracts we're on the fence about. Instead, they are

1 claiming that they don't understand what the class definition
2 is, which again, that is not a credible objection; and to hear
3 that they envision using search terms to identify the contract
4 is quite surprising.

5 We were told on our last meet-and-confer that they had
6 already identified 500 different versions of contracts, so we
7 said, Produce those. So I don't know how many other versions
8 counsel thinks exist beyond the 500 that they have already
9 identified, but this is not -- this is not a dispute about
10 search terms. This is a dispute about reading our discovery
11 requests fairly and understanding the class as defined and
12 responding to discovery in that light, and there is no ambiguity
13 in a class definition that says, you are going to -- you are
14 going to -- customers that were served under the exact language
15 of the plaintiff or any other contract that combines the
16 concepts that are the same concepts that are -- under which the
17 plaintiff would serve, those people are class members. It's a
18 very simple definition.

19 And again, our concern here is the defendants are
20 being overly cautious about what they say about that, you know,
21 it's not workable. It's too hard. It causes us to have to use
22 discretion, and they are using that as a way not to respond to
23 very straightforward discovery. All they need to do is produce
24 the contracts. Once they have produced the contracts, the
25 parties can meet and confer about class membership. And if

1 | there are any differences, and the defendant is confused, or if
2 | we have followups, we will make them. But we haven't gotten a
3 | single contract yet, and defendant is taking this position.
4 | Again, I'm quite surprised at the idea that they would -- they
5 | would need search terms in order to identify the contracts that
6 | they use to serve their customers.

7 | So the contract needs to just simply be produced, and
8 | we can work through this issue in that fashion. But for the
9 | defendant to be saying that they don't understand the class
10 | definition, and that they've got to substitute the word "word"
11 | for "concepts" is quite concerning to us because what we think
12 | is actually going on is that the defendant is attempting to
13 | narrow the class before we've had discovery.

14 | THE COURT: So in your view, Mr. McInturff, are --
15 | this dispute about the terminology "concept," you are primarily
16 | concerned about the defendant's using that to curtail discovery
17 | with respect to contracts themselves; but with respect to the
18 | other document requests, it sounds like you agree those would be
19 | subject to the search terms that you will be agreeing upon for
20 | the ESI? Do I have that right? Are there two categories of
21 | where these document requests fall?

22 | MR. McINTURFF: That's generally right. If I could
23 | just explain further? The contracts are going to be used to
24 | define the class. So once we have the contracts, we will define
25 | the -- the class will be defined, and so then we do the data

1 productions for charging data and comparative data, we will be
2 able to identify which individuals were served under a contract
3 that falls within the definition of the class. That's the first
4 step. So the first step is: Produce the contracts.

5 Now, when we get to the point of searching managerial
6 emails, I agree we are going to have to pick search terms, but
7 the fact that we are going to have to pick search terms doesn't
8 mean that the defendants can pretend to not understand the class
9 definition. I mean, in all seriousness, how can they pretend
10 that they don't understand what we've written?

11 MS. McTERNAN: May I respond?

12 THE COURT: Yes. Ms. McTernan, can you respond to --
13 well, I will let you respond more generally, but specifically I
14 want to hear from you about the concept of just producing all
15 the contracts not subject to search terms versus your contention
16 that you will be using search terms.

17 MS. McTERNAN: Right. Right. So it's our -- listen,
18 if we could just go and get all the contracts, you know, that
19 would be one thing, but our understanding is that our client's
20 files are not organized that way. And our -- you know, a lot of
21 it is actually within the database itself that I was
22 referencing. So we -- if we could, just, you know, get all of
23 these contracts, that would be one thing, but our understanding
24 is that the client's files are kept in another manner that would
25 require it to be -- the bulk of the -- excuse me -- the

1 contracts to be searched by way of the ESI.

2 And so, you know, and frankly, I just want to put on
3 the record that we reject the notion that we are pretending or
4 that it's not credible. You know, we are operating in good
5 faith here. We are trying to exercise, you know, our duties
6 here in a manner that makes sense and, you know, that is
7 compliant. So that's why we have even raised the objection is
8 because we want to get to the bottom of what we are looking for.
9 I mean, this is the first that we have heard that, you know,
10 that there are synonyms like "discounted," "first anniversary."
11 We've never been given any light into what "concepts" is
12 supposed to get.

13 So, you know, I think it would be helpful -- this was
14 helpful to learn, you know, that some of these synonyms, you
15 know, that we should be looking for. This is the first I'm
16 hearing of it. So again, we are just trying to operate in good
17 faith here and just figure out what we are to be searching for.

18 THE COURT: So, Ms. McTernan, why is this not like
19 looking for contracts or discovery with substantially similar
20 language to promotional or first-year customers with prevailing
21 retail price? How would this differ? Let's remove the concept
22 of, but if you were told, we want these contracts with this
23 language, and also look for contracts with substantially similar
24 language, would you object to that?

25 MS. McTERNAN: I mean, I actually think that that's

1 more towards in the direction of being understandable, sort of
2 similar to what we are looking for; but the concepts is just --
3 I don't -- it's -- it wasn't workable for us. But something
4 like, yes, similar. So -- yeah. I mean, I think that, you
5 know, if we are looking for "promotion" instead of "promotional"
6 or "discount" or something like that, I mean, I think that
7 that -- that is more understandable.

8 THE COURT: But so do you understand, though,
9 Mr. McInturff's concern is that you may have contracts that are
10 related to the idea of being promotional or for first-year
11 customers or with prevailing retail price, but they may not use
12 that precise language; they may be using different language
13 altogether, but still be related to promotional or first-year
14 customers? I'm not sure what that looks like, but I think the
15 idea is that sometimes when you are looking for -- if you are
16 just looking for the bare words of something, that may not
17 capture -- that may be limiting. It may not capture the entire
18 universe of documents that still relate to that word.

19 So how would you address that? And what is your view
20 about how to address that when you are reviewing these
21 contracts?

22 MS. McTERNAN: Yeah, I mean, I guess as of now, we
23 have just been looking at for -- you know, again, we are trying
24 to find clarity on it, so I guess I don't have -- I want to know
25 what they're specifically looking for, and then we can look for

1 it. You know, we have been looking for -- well, certainly the
2 words and different machinations of the words. You know, it's
3 not them in like any certain order or anything like that. And
4 so we are looking for -- and plus, you know, we are also going
5 to be searching for contracts in the database. So, you know,
6 honestly, I think this is probably not going to be the bulk of
7 what we're doing. I think the search terms will handle that,
8 but -- yeah.

9 THE COURT: What's the volume of the database that you
10 are saying you wouldn't be using search terms for? How many
11 contracts are we talking about? How many pages of documents?

12 MS. McTERNAN: That's not using the ESI?

13 THE COURT: Yes.

14 MS. McTERNAN: Well, that would just be the -- since
15 they're looking for exemplars, it would just be the form
16 contracts that are applicable in the last year or so. So there
17 is like -- it's about a dozen. It's not many.

18 THE COURT: So this whole dispute that you are talking
19 about, this concept of when it refers to the database, we are
20 just talking about 12 documents?

21 MS. McTERNAN: No, no, no. Not relating to the
22 database. This is just looking -- this is outside of the
23 database.

24 THE COURT: Okay. So as I understand it, these
25 contracts exist either in ESI -- in a database where you need to

1 do ESI searches --

2 MS. McTERNAN: Yes.

3 THE COURT: -- or some other form where you need to do
4 a more manual search; is that correct?

5 MS. McTERNAN: Yes.

6 THE COURT: So for the more manual search, what is the
7 volume of documents we are talking about for the contracts?

8 MS. McTERNAN: That -- well, since they are looking
9 for exemplars, you know, we have exemplars used in the past
10 year, so that would be the 12 or so. I haven't counted them
11 out.

12 THE COURT: Right. So that's just 12 documents. And
13 is there some -- and when in finding those 12 exemplars, are you
14 limiting yourself to just using the words "promotional,"
15 et cetera, and that's what gets you 12, or are you giving all
16 exemplars --

17 MS. McTERNAN: No.

18 THE COURT: -- of every contract that you had in that
19 year?

20 MS. McTERNAN: Right. We are using all the exemplars,
21 and we've told them, by the way, that we will also -- you know,
22 there was a promotion -- there was one contract that referenced
23 promotional variable price program, and we said, you know, we
24 are going to give you that. So we -- you know, we are not just
25 looking for these words.

1 THE COURT: Okay. And so -- but your contention is
2 for the rest, everything will require an ESI search term?

3 MS. McTERNAN: Yes.

4 THE COURT: Okay. So my thinking here is that, first
5 of all, I agree with the plaintiff that, you know, it's -- they
6 define the class. You may have issues with the definition for
7 purposes of class certification, and you will make those
8 arguments in good time, and -- but at this point, they are
9 entitled to define their class the way they have defined it.

10 Having said that, for purposes of searching for
11 documents, I understand that the defendants need a way forward
12 to be able to search for those documents. And in light of the
13 fact that some portion of these documents are going to be
14 produced using ESI search terms, it makes sense for the parties
15 to meet and confer about what those search terms will look like
16 so that the plaintiff can be assured that they are going to get
17 the broader set of documents that they believe fall within their
18 concepts of promotional prevailing retail price for first-year
19 customers, and that meets the defendant's need of being workable
20 so that they can actually apply those definitions and search --
21 apply those search terms and find the appropriate documents.

22 So in this case -- so I don't believe it makes sense
23 to -- for the defendants to continue to -- they should not be
24 standing on objections to vagueness for purposes of narrowing or
25 limiting discovery prematurely, but I don't think that that's

1 | what's really happening here. And I think what we need to do is
2 | have the plaintiff -- the defendants produce the exemplar
3 | contracts that they believe exist in that manual form; produce
4 | all of them, all the exemplars that exist. It does not look
5 | like it's a big volume, and it may be slightly overbroad beyond,
6 | you know, what you might believe are the concepts of promotional
7 | prevailing retail price for first-year customers; but even so, I
8 | think, I think that overbroadness would be de minimis. It's not
9 | a large volume.

10 | For the remaining bulk of the documents, it looks like
11 | this all comes down to negotiating search terms that make sense,
12 | and I -- rather than have the Court impose what those search
13 | terms are going to look like, I think the parties need to
14 | continue to meet and confer. Mr. McInturff needs to identify a
15 | long list of search terms that he believes will meet his class
16 | definition; that might subsume that class definition. That will
17 | include the concepts, not just the words of "promotional" or
18 | "first-year customers with prevailing retail price," and you
19 | should meet and confer, and the parties should then use those
20 | search terms going forward to find the documents that are
21 | responsive to the plaintiff's requests.

22 | And I think if we -- if you can do that, I think all
23 | of the disputes about limiting the definition prematurely to
24 | removing concepts and including words will become moot because I
25 | think it's right that the plaintiffs have the right to assert

1 their definition, and the defendants should not be substituting
2 new definitions of the class for purposes of discovery.

3 But as a practical matter, to be able to move forward
4 in discovery when you have ESI, you need to use search terms.
5 So that means the parties are going to need to figure out how to
6 search for the concepts of promotional and first-year customers
7 with prevailing retail price in a workable way that will be as
8 broad as the plaintiffs need, but will be feasible for the
9 defendants to use.

10 Does that make sense, Mr. McInturff?

11 MR. McINTURFF: It does, Your Honor. But if I could
12 ask for one clarification? Last week during the meet-and-confer
13 defense counsel represented to us that they had identified 500
14 different exemplar contracts, and the issue that came up is we
15 thought, well, how different are these contracts from one
16 another? We think that they are probably materially the same
17 and -- but defense counsel wasn't sure.

18 So again, the idea that the defense -- that defendant
19 needs to query a database to produce contracts is news to us,
20 and I don't understand why we were told that they had identified
21 500 different sets of contracts and can't just produce those.
22 If they can't -- if they are not able to analyze them or if they
23 don't believe it's efficient to analyze them, we will analyze
24 them. But again, the idea that we would have to use search
25 terms to find contracts applicable to the defendant's customers

1 is quite unorthodox, and I don't understand if they represented
2 to us last week that they had already identified 500 different
3 exemplar contracts, why they can't produce them.

4 THE COURT: Ms. McTernan, is there some -- what's the
5 discrepancy between the 500 you mentioned to Mr. McInturff and
6 the 12 you mentioned today?

7 MS. McTERNAN: Sure. So we didn't identify 500
8 contracts in the terms of like we have reviewed 500 contracts.
9 We were told by the client that there were upwards of 500
10 versions of the contracts over the years going back to, you
11 know, the eight-year period, but that's not to say that any were
12 actually identified or specifically, you know, reviewed; that
13 they were -- it's still the same thing that I mentioned earlier,
14 which is that the client has, you know, an easy access or
15 relatively easy access what they have in the past year, what
16 they have been using in the past year or so. Everything else,
17 it's been migrated into the servers, which would be the subject
18 of the ESI.

19 This was just kind of an -- what we have been told by
20 the client about, you know, based on their knowledge of their
21 business. You know, there are likely upwards of 500, you know,
22 versions of the contracts; not that we have specifically, you
23 know, been given a folder of 500 contracts or anything like
24 that.

25 MR. McINTURFF: May I interrupt, Your Honor?

1 THE COURT: Yes. Sure. Go ahead.

2 MR. McINTURFF: So migrated to a server; a server is
3 very different than a database. Migrated to a server means it's
4 on a server in a folder, and if they know they have 500
5 different versions, again, we don't have to apply search terms
6 to look for documents that can be easily identified and
7 produced, and that's not the same as contracts being plugged
8 into a database and then having to query the database.

9 Again, these are the form contracts that customers
10 have to sign to accept service. They are all the same. If they
11 have -- whatever versions of the contract they have going back
12 over the class period, they should be produced. They should
13 have been -- they should have been produced already, but I'm not
14 hearing anything from counsel saying that they can't simply go
15 get these contracts. They are saying they want to use search
16 terms, but they've got to be able to go get the contracts and
17 produce them.

18 THE COURT: So, Ms. McTernan, why -- maybe I
19 misunderstood how you described what needs to be done. Why
20 can't you just produce all versions of the contract that covers
21 the class period, whether or not they include the language that
22 we have, this promotional prevailing retail price, et cetera?

23 MS. McTERNAN: Right. So our understanding is that
24 the way that -- we have asked our client if they store contracts
25 in a folder like counsel is suggesting, and they said no. And

1 they are in the database and sort of part of the bigger, you
2 know, bigger trove of data because that's where they are saved.

3 The client does not -- it's our understanding that the
4 client does not just have a folder on its drive -- you know, on
5 its shared drive or something that has all of the contracts
6 applicable for the period, and we don't have blank forms of
7 them. It's just, you know, when we are talking exemplars, we
8 are just talking about someone's actual contract that we are
9 using as an exemplar. So that's just not the way that they are
10 organized at the client.

11 THE COURT: Can you go on a database right now and
12 just pull all the contracts that exist over the class period?

13 MS. McTERNAN: That, I don't know. I haven't -- I
14 haven't investigated that. I'm not sure.

15 THE COURT: So I mean, because it does seem strange
16 that your client wouldn't be able to, if they wanted to, pull
17 all the contracts in a query to be able to have a -- collect
18 them without even looking at them or applying search terms. So
19 that's what I am trying to understand. Because what I -- I
20 don't understand how you are saying there is a -- what is -- I'm
21 unclear about where you are talking about a folder existing that
22 you have to do some manual search versus this ESI search.

23 MS. McTERNAN: Sure. Well, let me clarify something
24 about the database. I mean, to the extent that we can just, you
25 know, look -- our client can just, you know, just get the

1 contracts, even if they could, the issue would be the volume
2 because it would be getting, you know, upwards of a hundred
3 thousand. Our client has upwards of a hundred thousand or plus
4 customers. So it would be pulling each individual's contracts.
5 So that -- because of a volume concern as well, that is going to
6 be subject to the ESI search and not something that -- it's not
7 a search that my client can run, you know, sitting in an office
8 because it would just take up -- the volume would just be too
9 large.

10 THE COURT: So what is the -- when you are referring
11 to needing to do a manual search, that didn't include what you
12 just described, the hundred thousand --

13 MS. McTERNAN: No.

14 THE COURT: Okay. That was something different?

15 MS. McTERNAN: That was something different, yes.

16 THE COURT: Okay. I see.

17 Okay. So I think it still goes back to what I
18 originally said, which is, I don't know -- however many versions
19 exist, I think just to the extent you have a manual -- that this
20 manual group of documents that are not subject to any sort of
21 ESI searches, all of those exemplars should be produced during
22 the class period to the plaintiff as soon as possible without
23 limitations on the language that's used in them so that you
24 don't have this issue of concepts versus words that use
25 promotional prevailing retail price.

1 For the remaining volume, I can't -- I don't have
2 enough information today to know -- to sort through this issue
3 of the database and how the searches can be done. I will take
4 you at face value, Ms. McTernan, that the volume is 100 -- you
5 know is very large, and to be able to manage production of those
6 documents, unless the plaintiffs want all hundred thousand
7 contracts, you will be applying search terms, which brings me
8 back to the first point I made, which is, I think the bulk of
9 this dispute needs to come down to negotiations over search
10 terms that will be applied so that you can pull the relevant
11 documents.

12 So that's where -- what I think needs to be done. So
13 what I would like the parties to do is, I want the plaintiffs to
14 produce the exemplars that can be produced as soon as possible,
15 and I want the parties to meet and confer about the search terms
16 to be used on the ESI, which would encompass these contracts.
17 And I think I would like to have a status letter sent to me in
18 two weeks, a joint status letter giving me an update on where
19 things stand on this issue.

20 MR. McINTURFF: Your Honor, this is Burkett McInturff.
21 Can I be heard on one issue?

22 THE COURT: Sure.

23 MR. McINTURFF: Yes. So what I hear from counsel is
24 they have hundreds -- more than a hundred thousand actual
25 contracts that were applied to class members or potential class

1 members, and that they have various versions of the contracts,
2 but that what they haven't identified is any sort of location of
3 where those various versions are. Again, these are one-page,
4 two-page form contracts.

5 So we are completely confused at the idea that defense
6 counsel has not been able to find out from its client how these
7 contracts are being drafted over time and where the records of
8 the form, the actual forms -- because remember, each time when
9 they change the contract, they have got to go back to presumably
10 a Microsoft Word document and edit it -- so where those forms
11 are being kept. And so we have asked about this in the
12 meet-and-
13 confer, and now I'm hearing counsel -- the revelations of
14 counsel about the database and the apparent inability to locate
15 where these forms are kept. I think it might make sense for us
16 to take a limited 30(b)(6) deposition to get to the bottom of
17 this contract-drafting process.

18 And I will also say, we issued an interrogatory asking
19 for the names of the individuals involved in the contract-
20 drafting process, and we were given the very curious answer that
21 the only individual defense counsel could identify that was
22 involved in the contract-drafting process is the former CEO. So
23 that person is not even an employee of the company. So I think
24 that the quickest way to get to the bottom of this is, if Your
25 Honor will authorize a limited 30(b)(6) deposition, we could

1 take it remotely, so that we can get to the bottom of this issue
2 as to where the documents that are used to draft the contracts
3 that are applied to these hundreds of thousands -- a hundred
4 thousand customers, where those are stored. They can't -- you
5 can't operate a business without having records of the contracts
6 that are being used. And so I think that we can get to the
7 bottom of this very quickly through a limited 30(b)(6)
8 deposition.

9 THE COURT: Why do you think -- why would the Court --
10 you need the Court's permission to serve a 30(b)(6) notice?

11 MR. McINTURFF: Because of the limits on 30(b)(6), you
12 know, you can only take one. So we would request leave so as
13 not to toll the number of hours that we can -- that we would be
14 utilizing because, I mean, this is a 26(g) reasonable inquiry
15 issue. I'm just -- I don't understand why we can't get a
16 straight answer. So if we're having to go take a 30(b)(6) on
17 this, I think in all fairness, it shouldn't count towards our, I
18 think what, seven hours of 30(b)(6).

19 THE COURT: Okay. So what I think here is that -- I
20 mean, I think that maybe -- I think we -- let's put that to one
21 side for now. I think that's -- it's probably premature. I
22 think in this conference we have heard some news about the
23 database that was news to you. I'm not in a position to be able
24 to get to the bottom of that on today's call because I think the
25 parties should meet and confer about the issues about this

1 database, how it is searched, so that you can get some answers
2 from Ms. McTernan and the defendant about how their documents
3 are stored and what's possible.

4 I think in two weeks' time send me a joint status
5 letter to determine whether this -- whether you have gotten to
6 the bottom of it, can apply search terms or if more information
7 is required, if you need a 30(b)(6).

8 I'm hopeful that, Ms. McTernan, you will, having heard
9 the confusion of the plaintiff about how documents are stored,
10 that you will be forthcoming about explaining precisely how the
11 documents are stored on the database, how they can be searched
12 and queried, what the volume of that information is. I would
13 expect all of that kind of information to be shared as part of
14 your meet-and-confer.

15 And then, Mr. McInturff, if you are still not able to
16 get the answers you need and feel that a 30(b)(6) or some other
17 form of inquiry is necessary, then we can discuss that in two
18 weeks' time.

19 MR. MCINTURFF: Thank you, Your Honor.

20 THE COURT: Okay. Is there anything else for today,
21 Mr. McInturff?

22 MR. MCINTURFF: No. And I don't know if Your Honor
23 wanted to set a control date for another conference or not, but
24 that would -- that's the only other item I would raise.

25 THE COURT: Okay. So -- and, Ms. McTernan, anything

1 else from you?

2 MS. McTERNAN: No. Nothing further.

3 THE COURT: Okay. So I think two weeks from today I
4 would like a joint status letter from the parties about this
5 issue and where things stand. I think I will wait to get that
6 letter. I'm just looking at the calendar. Excuse me.

7 Are the parties available during the week of -- well,
8 I'm trying to figure out -- let me -- I will set a control date
9 for a followup call after receiving the parties' letters, but I
10 will do it by minute entry because at the moment I don't know
11 yet what date will work best. But are the parties around during
12 the week of August 7th?

13 MR. McINTURFF: Plaintiff is available.

14 MS. McTERNAN: Yes, Your Honor.

15 THE COURT: Okay. So I will see if I can set this
16 thing as a control date during that week, but that will be noted
17 on the minute entry for today's conference.

18 And with that, I will adjourn for today, and I will
19 hear from you in two weeks.

20 MR. McINTURFF: Your Honor, this is Burkett McInturff.
21 I apologize. Just to be clear, the status letter in two weeks,
22 that's a joint letter or do you want separate status letters?

23 THE COURT: A joint letter.

24 MR. McINTURFF: Okay.

25 THE COURT: All right. Thank you.